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REUNION.COM, INC.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

VIOLETTA HOANG, LIVIA HSIAO,
and MICHAEL BLACKSBURG,
individually and on behalf of all others
similarly situated,

Plaintiffs,

vs.

REUNION.COM, INC., a California
corporation,

Defendant.

No. 3:08-cv-3518

**NOTICE OF MOTION AND
DEFENDANT'S MOTION TO DISMISS
PURSUANT TO RULE 12(B)(6) OF THE
FEDERAL RULES OF CIVIL
PROCEDURE – AMENDED TO ATTACH
TABLES OF AUTHORITIES/CONTENTS**

Hearing Date: October 3, 2008
Time: 9:00 a.m.
Judge: Hon. Maxine M. Chesney
Courtroom: 7, 19th Floor

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TO ALL PARTIES AND COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on the 3rd day of October, 2008, at the hour of 9:00 a.m., or as soon thereafter as counsel may be heard, I shall appear before the Hon. Judge Maxine M. Chesney, or any judge sitting in her stead, in the courtroom usually occupied by her (Room 7, 19th Floor) at 450 Golden Gate Ave., San Francisco, California, and then and there present *Defendant's Motion to Dismiss Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure*.

STATEMENT OF RELIEF SOUGHT

Defendant Reunion.com, Inc. ("Reunion.com") seeks dismissal of Plaintiffs' Complaint with prejudice pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiffs' claims are barred in that they are preempted by the Controlling the Assault of Non-Solicited Pornography Act of 2003 ("CAN SPAM"), 15 U.S.C. § 7707(b)(1), *et seq.* Even if Plaintiffs' claims were not preempted, they would still fail as a matter of law in that the emails at issue do not violate Cal. Bus. & Prof. Code § 17529.5(a) (the "State Statute").

MEMORANDUM OF POINTS AND AUTHORITIES**INTRODUCTION**

Reunion.com is one of the most popular people search and social networking websites in the United States. Within the last half decade, it has grown to have more than forty five million (45,000,000) registered members. Reunion.com prides itself on helping friends, family, classmates, and colleagues find and reconnect with others, as well as help members stay close and in touch with the important people in their lives. The Reunion.com website attracts nearly twelve million monthly visitors, and, out of tens of thousands of internet sites, is ranked seventy two in the United States by comScore, the standard for Internet popularity measurement. Reunion.com's countless success stories have been featured nationally on television, in newspapers, and magazines, which often include members recommending the popular service. It is with this history that

1 Reunion.com has now been brought into this meritless lawsuit in an effort to shake
2 it down for a monetary payoff by alleging transparently contrived and unfounded
3 claims which, upon closer scrutiny, have no basis in fact nor law.¹

4 The basis of Plaintiffs' Complaint is that they each allege that they received
5 unsolicited e-mail invitations to join Reunion.com which were from their friends
6 who joined Reunion.com. Plaintiffs complain that these forward-to-a-friend emails
7 are "false" and "misleading," and, therefore, violate the State Statute, though
8 Plaintiffs conspicuously fail to allege that they were actually misled or harmed in
9 any way. Plaintiffs' claims, which are based on a fanciful mischaracterization of
10 the emails, fail as a matter of law because they are preempted by CAN SPAM and
11 because the emails do not violate the State Statute.

12 As more fully set forth below, CAN SPAM, which undeniably preempts
13 most state laws regulating commercial emails, expressly permits "routine
14 conveyances" such as the forward-to-a-friend emails sent via the Reunion.com tool
15 at issue here. In addition, the Federal Trade Commission ("FTC"), tasked by
16 Congress with setting regulations governing CAN SPAM, has also definitively
17 ruled that these forward-to-a-friend emails are not fraudulent, but, rather, are
18 permitted "routine conveyances" for which the website facilitating the sending of
19 the emails is not responsible. The express terms of CAN SPAM and the FTC's
20 ruling preempt any claim brought under the State Statute relating to such forward-
21 to-a-friend emails.

22 Plaintiffs' claims appear to be just another "get rich quick" scheme by the
23 Plaintiffs' bar designed to extort settlements from honest companies employing
24 legitimate business practices. As will be evidenced below, based upon Plaintiffs'
25 own allegations, it is abundantly clear that the emails at issue fall squarely within
26

27 ¹ It is worth noting that out of 45 million registered members, Plaintiffs' counsel was able to recruit
28 only three Plaintiffs, two of whom received emails on a single day in May 2008 and a third who
received a single email in July 2008, just six days before Plaintiffs filed their Complaint.

1 the categories of emails that Congress and the FTC have determined are legally
 2 permitted. As such, because CAN SPAM preempts state law, including state laws
 3 that conflict with CAN SPAM, Plaintiffs' allegations cannot support a state law
 4 claim of liability either.

5 Finally, even if Plaintiffs' claims were not preempted by CAN SPAM, as
 6 they clearly are, they would still fail as a matter of law because the emails are not
 7 false or deceptive and Plaintiffs fail to allege facts that would support a violation of
 8 the State Statute. As a result, on application of any legal theory, Plaintiffs'
 9 Complaint fails as a matter of law to state a claim upon which relief can be granted
 10 and should be dismissed, with prejudice.

11 **FACTUAL BACKGROUND**

12 Plaintiffs allege that "Reunion.com operates a social networking internet
 13 website. The Reunion.com website allows members to search for old friends,
 14 classmates and colleagues. A member of the Reunion.com website can add other
 15 members to his or her 'Friends' list, thereby creating a social network of
 16 Reunion.com members." (Complaint, ¶ 16)

17 Plaintiffs each allege that they received one or more emails via Reunion.com
 18 which included the name of a friend or colleague in the "from" line. (Complaint,
 19 ¶ 24, 27, 30-31) Plaintiffs' Complaint, however, is devoid of any allegations: that
 20 their friends and colleagues did not join Reunion.com; that their friends and
 21 colleagues did not voluntarily provide Plaintiffs' email addresses to Reunion.com
 22 for purposes of sending email invitations; or that Plaintiffs were actually misled by
 23 the emails they received.²

24
 25
 26
 27
 28 ² Nor do Plaintiffs allege that Reunion.com paid Plaintiffs' friends for the email addresses they provided.

1 Plaintiffs allege that Reunion.com maintains a Privacy Policy, accessible
 2 from its webpage.³ (Complaint, ¶ 19) The Reunion.com Privacy Policy expressly
 3 advises members that, by registering as a member of Reunion.com, they are
 4 agreeing to accept the terms of the Privacy Policy. (Ex. A, p. 1 of Declaration of
 5 Larry Baird ["Baird Decl."]) The Privacy Policy gives Reunion.com members the
 6 option to provide Reunion.com with names and e-mail addresses of selected
 7 contacts and to have Reunion.com "automatically send your friend a one-time
 8 email inviting him or her to visit the site." (*Id.*)

9 The emails which Plaintiffs Hoang and Hsiao allegedly received are
 10 virtually identical in format. For each email, the "from" line bears the name of a
 11 person Plaintiffs acknowledge is a friend or colleague followed by "<verify@relay
 12 05.reunion.com>." The subject line on each of these emails reads "_____
 13 wants to connect with you!," with the names of the Reunion.com member initiating
 14 the email (*i.e.*, Plaintiffs' friends) inserted in the blank. In addition, each email
 15 states in its text: "You have received this email because a Reunion.com Member
 16 sent an invitation to this e-mail address." (Complaint, ¶¶ 24, 27)

17 Plaintiff Blacksbury claims to have received his email through a Google
 18 electronic mailing list referred to as "FOOLD@GOOLGEGROUPS.COM."
 19 Plaintiff Blacksbury alleges that the electronic mailing list is "comprised of a
 20 program that enables a person to subscribe to a list by supplying his or her e-mail
 21 address. Thereafter, any subscriber may send an email to a single email address ...
 22 and the electronic email address program re-sends that email to all the other
 23 subscribers on the list." (Complaint, ¶ 30) Blacksbury alleges that the email he
 24

25 ³ While the versions of the Reunion.com Privacy Policy in effect at the time of the emails at issue
 26 in this action are not attached to the Complaint, the Privacy Policy and its contents are expressly
 27 referenced in the Complaint. (Complaint, ¶ 19) As a result, this Court may consider the contents
 28 of the Privacy Policy in ruling on Reunion.com's motion to dismiss. *Van Buskirk v. Cable News*
Network, Inc., 284 F.3d 977, 980 (9th Cir. 2002); *The Missing Link v. eBay, Inc.*, 2008 U.S. Dist.
 LEXIS 40593, *8 (N.D. Cal. May 5, 2008) (taking judicial notice of eBay's User Agreement
 "because the Complaint relies extensively" upon it).

1 received appeared to have been sent by Erick Dunn, admittedly a member of
2 Blacksburg's Google electronic mailing list. (Complaint, ¶ 30) The "from" line of
3 the Blacksburg email reads: "Erick Dunn <[redacted]@yahoo.com>." (*Id.*, ¶ 31)
4 The subject line reads "[Fool'd] Please connect with me :)." (*Id.*) Like the other
5 emails, the Blacksburg email indicates in the body: "You have received this email
6 because a Reunion.com Member sent an invitation to this email address." (*Id.*)

7 Based on these facts, Plaintiffs allege three separate and distinct violations
8 of the State Statute:

- 9
- 10 • Plaintiffs allege that Reunion.com violated § 17529.5(a)(1) in that "the
11 Emails received . . . deceptively contained or were accompanied by third-
12 party domain names without the permission of the third parties."
13 (Complaint, ¶ 42) In particular, Plaintiffs point to the presence of
14 "yahoo.com" in the email address of the Reunion.com member who
15 initiated the invitation using Reunion.com's invitation tool. (*Id.*, ¶ 33)
 - 16 • Plaintiffs allege that Reunion.com violated § 17529.5(a)(2) in that "the
17 Emails contained or were accompanied by falsified, misrepresented, or
18 forged header information in the 'From' line, which falsely
19 represented that the Email had been sent from an individual, rather than
20 from Reunion.com." (Complaint, ¶ 48)
 - 21 • Plaintiffs allege that Reunion.com violated § 17529.5(a)(3) in that the
22 "Emails contained subject lines that Reunion.com knew were likely to
23 mislead the recipients, acting reasonably under the circumstances, about
24 a material fact regarding the contents of the subject matter of the
25 messages. To wit, each Email contained a subject line stating 'Please
26 Connect With Me :-)', '[Member Name] Wants to Connect With You', or
27 something substantially similar, with no reference to Reunion.com."
28 (Complaint, ¶ 53)

As set forth more fully below, even if Plaintiffs' claims were not preempted by CAN SPAM, as they are, Reunion.com has not violated any of the provisions of the State Statute as a matter of law.

ARGUMENT

Federal Rule of Civil Procedure 12(b)(6) requires the dismissal of a Complaint that fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). While the allegations of the Complaint are taken as true for purposes of a Rule 12(b)(6) motion, *Moore v. City of Costa Mesa*, 886 F.2d 260, 262 (9th Cir. 1989), the Supreme Court has held that the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007). It is not enough for the plaintiff to allege some set of facts that could conceivably give rise to a cause of action; rather, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at 1974. As explained below, Plaintiffs fall woefully short of this standard.

I. PLAINTIFF'S CLAIMS ARE BARRED AS A MATTER OF LAW BECAUSE THEY ARE PREEMPTED BY CAN SPAM.

CAN SPAM does not give rise to a private right of action. 15 U.S.C. § 7706. In a transparent effort to overcome this fatal hurdle, Plaintiffs base their claims on the State Statute, which provides:

a) It is unlawful for any person or entity to advertise in a commercial email advertisement either sent from California or sent to a California electronic mail address under any of the following circumstances:

(1) The email advertisement contains or is accompanied by a third-party's domain name without the permission of the third party.

(2) The email advertisement contains or is accompanied by falsified, misrepresented, or forged header information. This paragraph does not apply to truthful information used by a third

1 party who has been lawfully authorized by the advertiser to use
2 that information.

3 (3) The email advertisement has a subject line that a person
4 knows would be likely to mislead a recipient, acting reasonably
5 under the circumstances, about a material fact regarding the
6 contents or subject matter of the message.

7 Cal. Bus. & Prof. Code § 17529.5(a). Although there is nothing at all false or
8 misleading about the emails in question, Plaintiffs' claims fail, *ab initio*, as a
9 matter of law because they are preempted by CAN SPAM.

10 *A. CAN SPAM Provides A National Standard For Commercial Emails That
11 Preempts State Law.*

12 When Congress enacted CAN SPAM, it determined that there was a
13 substantial governmental interest in regulating commercial emails, and that a
14 multitude of state laws purporting to regulate such emails created an ineffective
15 patchwork of regulations. 15 U.S.C. § 7701(A)(11), (B). As a result, Congress
16 provided that CAN SPAM **"supersedes any statute, regulation, or rule of State
17 or political subdivision of a state that expressly regulates the use of electronic
18 mail to send commercial messages,** except to the extent that any such statute,
19 regulation, or rule prohibits falsity or deception in any portion of a commercial or
20 electronic mail message or information attached thereto." 15 U.S.C. § 7707(b)(1)
(emphasis added).

21 CAN SPAM makes it "unlawful for any person to **initiate** the transmission,
22 to a protected computer, of a commercial electronic mail message, or a
23 transactional or relationship message, that contains, or is accompanied by, header
24 information that is materially false or materially misleading." 15 U.S.C.
25 § 7704(a)(1) (emphasis added).⁴ Under CAN SPAM, initiate "means to originate

26 ⁴ CAN SPAM also provides that "[i]t is unlawful for any person to initiate the transmission to a
27 protected computer of a commercial email message if such person has actual knowledge, or
28 knowledge fairly implied on the basis of objective circumstances, that a subject heading of the
message would be likely to mislead a recipient, acting reasonably under the circumstances, about a
material fact regarding the contents or subject matter of the message. . . ." 15 U.S.C. § 7704(a)(2).

1 or transmit such message or to procure the origination or transmission of such
2 message, **but shall not include actions that constitute routine conveyance** of
3 such message.” 15 U.S.C. § 7702(9) (emphasis added). “Routine conveyance” is
4 defined as “the **transmission, routing, relaying**, handling, or storing, through **an**
5 **automatically technical process**, of an electronic mail message for which **another**
6 **person** has identified the recipient or provided **the recipient addresses**.” 15
7 U.S.C. § 7702(15) (emphasis added). Per the above definitions, routine
8 conveyances do not create liability under CAN SPAM and are expressly permitted.
9 As a matter of law, a party merely engaging in a routine conveyance initiated by a
10 third party is not acting in a fraudulent or misleading manner. As a matter of
11 undisputed fact, this is the case here.

12 There can be no question that the email process alleged by Plaintiffs and
13 described in Reunion.com’s Privacy Policy, which is incorporated into Plaintiffs’
14 Complaint, involves the “transmission, routing [or] relaying” of emails through “an
15 automatically technical process.” 15 U.S.C. § 7702(15). Moreover, it cannot be
16 disputed, nor is it, that the “recipient addresses” were provided not by
17 Reunion.com, but by “another person,” in this case Plaintiffs’ friends. *Id.*
18 Plaintiffs’ own allegations place the emails in question squarely within the
19 definition of routine conveyances, and thus outside of the limited area which
20 Congress left for the states to regulate. CAN SPAM expressly recognizes that
21 there are circumstances in the online world where one party is simply engaging in
22 a routine conveyance of emails between parties and those emails are expressly
23 permitted. Plaintiffs may disagree with Congress, but they cannot substitute their
24 judgment for that of Congress, which has given clear directive that CAN SPAM
25 preempts these types of claims.

26 Congress also recognized that further guidance regarding the scope of CAN
27 SPAM was necessary and so it authorized the FTC to “issue regulations to
28

1 implement the provisions of this Act.” 15 U.S.C. § 7711. Consistent with this
2 mandate, in the spring of 2008, the FTC released its Definitions and
3 Implementation under the CAN-SPAM Act (the “Final Rule”), in which it
4 provided further clarification on the scope, meaning and construction of CAN
5 SPAM. This Final Rule was open to public comment and under consideration for
6 approximately three years. The resulting Final Rule reflects a carefully considered
7 and fully informed interpretation on the scope and implementation of CAN
8 SPAM.⁵

9 Within the context of the Final Rule, the FTC expressly considered the
10 applicability of CAN SPAM to “forward-to-a-friend” emails, which it defined as
11 including scenarios “in which a seller’s web page enables visitors to the seller’s
12 website to provide the email address of a person to whom the seller should send a
13 commercial email.”(Final Rule; Ex. A, p. 65 of Shelton Declaration) Significantly,
14 the FTC concluded in the Final Rule that forward-to-a-friend emails are routine
15 conveyances and do not violate CAN SPAM in situations exactly such as the one
16 found here: a “seller that transmits a message through an automatic technical
17 process to an email address provided by a forwarder, absent more, is engaged in
18 ‘routine conveyance’ and **is exempt from liability under the State Statute.**”
19 (Final Rule, p. 73, emphasis added).

20 There is no doubt that the emails at issue here were sent as part of a
21 forward-to-a-friend campaign. Plaintiffs allege that Reunion.com’s “web page
22 enables visitors to the seller’s website to provide the email address of a person to
23 whom the seller should send a commercial email.” (Final Rule, p. 65) Plaintiffs
24 expressly allege that the purpose behind Reunion.com’s social networking website
25

26 ⁵ As the Final Rule was issued in the spring of 2008, long before Plaintiffs filed their Complaint, it
27 is clear that Plaintiffs and their counsel either didn't bother to conduct the necessary research into
28 CAN SPAM and the FTC's interpretation thereof or they elected to proceed with their claims
knowing that the FTC had already conclusively ruled that their claims are baseless. Either
explanation is inexcusable.

1 is to allow members to “search for old friends, classmates and colleagues.”
2 (Complaint, ¶ 16) Plaintiffs also allege that this is accomplished, in part, when
3 “Reunion.com asks registered members to provide the password to the registered
4 member’s email account” so that Reunion.com can “access the registered
5 member’s contacts for the purpose of sending emails ‘from Reuion.com’ to certain
6 or all of those contacts and ‘inviting them to join’ Reunion.com.” (*Id.*, ¶¶ 18-19)

7 The provision of a member’s contacts is entirely voluntary; the member
8 decides whether or not they want Reunion.com to send emails to their friends and
9 contacts, inviting them to join the network. (Ex. A, p. 1 of Baird Decl.) Members
10 are unambiguously advised that emails will be sent out by Reunion.com on their
11 behalf should they elect to invite their friends and contacts to join. (*Id.*) Plaintiffs
12 do not, and cannot, allege that Reunion.com provides consideration for these
13 emails. Thus, the emails fall precisely within the FTC’s definition of permitted
14 forward-to-a-friend communications: “[Reunion.com’s] web page enables visitors
15 to [Reunion.com’s] website to provide the e-mail address of a person to whom
16 [Reunion.com] should send a commercial email [the invitation to join the
17 network].” (Final Rule, p. 65)

18 To the extent Plaintiffs complain that the “From” lines on the emails are
19 false and misleading, CAN SPAM again says otherwise. Specifically, CAN
20 SPAM provides that a “From” line that “accurately identifies **any person who**
21 **initiated the message** shall not be considered false or materially misleading.” 15
22 U.S.C. § 7704(a)(1)(B) (emphasis added). For the reasons explained above, and
23 the law previously cited, Reunion.com did not “initiate” the emails in question,
24 but, in fact, the Reunion.com member and friend of the recipient was the person
25 initiating the emails as a matter of law. As such, under any analysis, Plaintiffs’
26 friends, each of whom is identified accurately in the “From” lines of the emails,
27
28

1 were initiators. As a result, the emails cannot, as a matter of law, be “considered
2 false or materially misleading,” and Plaintiffs’ claim fails, as a matter of law. *Id.*

3 *B. Plaintiffs’ Claims Are Preempted By CAN SPAM.*

4 In order to ensure that there is a uniform standard governing commercial
5 emails in the United States, CAN SPAM includes a broad preemption of state law.
6 15 U.S.C. § 7707(b)(1). While Congress permitted the states to regulate
7 commercial emails that are false or deceptive, *Id.*, “it is clear that it meant these
8 terms to refer to traditional, tort-type concepts and not to innovative theories.”
9 *Kleffman v. Vonage Holdings Corp.*, 2007 U.S. Dist. LEXIS 40487, *7-8 (C.D.
10 Cal. May 23, 2007).

11 For example, in *Kleffman*, the plaintiff alleged that Vonage violated the State
12 Statute by sending unsolicited commercial emails to the plaintiff from a variety of
13 email addresses, thus avoiding spam filters which flag emails from high volume
14 senders. The trial court granted Vonage’s motion to dismiss with prejudice,
15 holding that the plaintiff’s claims were preempted by CAN SPAM. In so doing,
16 the court held that Congress intended to narrowly limit the types of practices that
17 states could continue to regulate:

18 In short, Congress intended that legitimate businesses would
19 not have to guess at the meaning of various state laws when
20 their advertising campaigns ventured into cyberspace. It thus
21 left states room only to extend their *traditional* fraud
22 prohibitions to the realm of commercial emails because it was
23 confident that legitimate businesses would not unwittingly
24 transgress such well-established prohibitions.

25 *Kleffman*, 2007 U.S. Dist. LEXIS 40487 at *8-9 (emphasis in original). Because
26 *Kleffman*’s claim went beyond traditional tort theory, the court held that it was
27 preempted by CAN SPAM. *Id.* Here, Plaintiffs do not allege a traditional fraud.
28 In fact, Plaintiffs do not even allege that they were misled.

1
2 Instead, Plaintiffs' claim appears to be just another "get rich quick" scheme
3 by the Plaintiffs' bar designed to extort settlements from honest companies
4 employing legitimate business practices. Based upon Plaintiffs' own allegations,
5 however, it is abundantly clear that the emails at issue fall squarely within the
6 categories of emails that Congress and the FTC have determined are legally
7 permitted. Because CAN SPAM preempts state law, including state laws that
8 conflict with CAN SPAM, Plaintiffs' allegations cannot support a state law claim
9 of liability either.

10 The FTC has concluded that forward-to-a-friend emails such as the
11 Reunion.com emails at issue in this litigation are not fraudulent or misleading, but
12 rather permitted "routine conveyances." (Final Rule, pp. 71-76) That
13 determination, authorized by Congress, as well as the express provisions of CAN
14 SPAM, preempts any attempt to restrict or penalize forward-to-a-friend emails
15 under state law. 15 U.S.C. § 7707(b)(1); *Hall v. North American Van Lines*, 476
16 F.3d 683, 689 (9th Cir. 2007) (finding state law claims preempted by Carmack
17 Amendment); *Kleffman*, 2007 U.S. Dist. LEXIS 40487 at *9.

18 Plaintiffs are trying to turn what Congress and the FTC have already held to
19 be permissible forward-to-a-friend emails into something they are not. Because
20 Congress and the FTC have already determined that these emails are not false or
21 materially misleading, but rather are appropriate and lawful routine conveyances,
22 they cannot fall within the limited exception to CAN SPAM's preemption of state
23 law.

24 *C. Plaintiffs' Conclusory Allegations Of Deception Are Not Enough To Save*
25 *Plaintiffs' Complaint.*

26 In an apparent attempt to salvage their claims in the face of their own factual
27 allegations, Plaintiffs assert a series of conclusory allegations and characterizations
28 designed to portray the emails in a nefarious light. Those efforts, however, are
unavailing.

1 Although Plaintiffs complain that the emails they received were “disguised
2 so as to appear to come not from Reunion.com, but from registered members
3 personally” (Complaint, ¶ 20), their own allegations demonstrate that it was the
4 registered members who requested that Reunion.com send the emails to Plaintiffs.
5 Significantly, Plaintiffs offer no allegations regarding what their friends did when
6 they joined Reunion.com or what they did or did not ask Reunion.com to do with
7 their contacts. Thus, it is clear that the emails were exactly what they purported to
8 be, invitations initiated by Plaintiffs’ friends to join Reunion.com.

9 Plaintiffs also allege that the emails were misleading because the subject
10 lines do not expressly use “invitational” language, but instead say something
11 “colloquial” such as “Please Connect with me :).” (Complaint, ¶¶ 21, 53)
12 Plaintiffs complain that these subject lines are misleading because they would lead
13 the recipient to believe “that the Email was a personal request to connect with an
14 individual.” (*Id.*) But that is exactly what the emails were, requests by members
15 that Reunion.com invite Plaintiffs to join.

16 Plaintiffs must do more than plead conclusions of deception; they must plead
17 facts sufficient “to raise a right to relief above the speculative level.” *Bell Atlantic*,
18 127 S. Ct. at 1965. In addition to all of the legally fatal flaws discussed above,
19 even this they fail to do. In *Bell Atlantic*, the plaintiff alleged a violation of § 1 of
20 the Sherman Act based solely on allegations of parallel conduct and conclusory
21 allegations of a conspiracy. The Court, noting that parallel conduct in and of itself
22 is not illegal, held that plaintiffs “have not nudged their claims across the line from
23 conceivable to plausible.” *Bell Atlantic*, 127 S. Ct. at 1974. Similarly, Plaintiffs’
24 conclusory allegations that these legal and legitimate emails were “deceptive” or
25 “misleading,” without more factual allegations, fail to “nudge their claims across
26 the line from conceivable to plausible.” *Id.*

1 In enacting CAN SPAM, Congress set out to provide uniform regulation of
2 commercial emails in a manner designed to prevent fraudulent and abusive
3 practices, while permitting legitimate and routine conveyances. Plaintiffs cannot
4 use artful pleading to circumvent this Congressional intent. *Cleghorn v. Blue*
5 *Shield of California*, 408 F.3d 1222, 1226 (9th Cir. 2005) (“Artful pleading does
6 not alter the potential for this suit to frustrate the objectives of ERISA”); *Kleffman*,
7 2007 U.S. Dist. LEXIS 40487 at *7-9.

8 Permitting Plaintiffs’ claims to stand not only threatens to defeat
9 Congressional intent, it also presents a serious threat to the host of legitimate
10 business and government websites, including popular and growing social
11 networking websites (LinkedIn, FaceBook, etc.) that operate under and rely on
12 CAN SPAM.

13 To even further dramatically highlight the absurdity of Plaintiffs’ claims,
14 even the FTC’s own website uses forward-to-a-friend technology. News releases
15 on the FTC website offer viewers the opportunity to “E-mail this News Release” to
16 third parties. *See, e.g.*, <http://www.ftc.gov/opa/2008/08/tsr.shtm>. If Plaintiffs are
17 correct in their theory, then the FTC is also routinely sending “fraudulent” and
18 “misleading” emails, a ridiculous conclusion which can only be reached if
19 Plaintiffs’ Complaint is not dismissed as prayed for herein.

20 **II. EVEN IF PLAINTIFFS’ CLAIMS WERE NOT PREEMPTED, THEY**
21 **WOULD STILL FAIL AS A MATTER OF LAW BECAUSE THE**
22 **EMAILS DO NOT VIOLATE THE STATE STATUTE.**

23 While Reunion.com believes that preemption disposes of Plaintiffs’ claims
24 for the reasons set forth above, even if the Court were to apply the State Statute,
25 the end result would be the same. The emails are simply not misleading and do not
26 violate the State Statute.

27 The State Statute was originally passed in 2003, shortly before the
28 enactment of CAN SPAM, and provided broad restrictions relating to commercial

1 emails. After the enactment of CAN SPAM in 2003, the California Legislature
2 amended the State Statute in order “to avoid confusion as to what parts of existing
3 state law are preempted by federal law and what parts remain viable.” California
4 SB 1457, Assembly Committee, August 11, 2004. The author of the revisions to
5 the bill stated that “it is not his intent to penalize legitimate business for email
6 advertisements that are within their normal course of correspondence.” California
7 SB 1457, Assembly Committee, June 22, 2004.

8 The two underlying principals that resonate from the legislative history are
9 that the State Statute was intended to apply only to those actions which are not
10 preempted by CAN SPAM and that it be used to prevent only truly fraudulent and
11 misleading emails, not legitimate communications. Significantly, the California
12 Legislature has reaffirmed its intent through AB 2950, a bill that amends the State
13 Statute. AB 2950, which has passed both the Senate and the Assembly,⁶ adds a
14 new subsection (a) which provides:

15 It is the intent of the Legislature that this section, which
16 prohibits all types of **falsity and deception** in commercial
17 e-mail messages, shall operate **within the exception to federal**
18 **preemption** to the full extent permitted by the CAN-SPAM Act
19 of 2003 (15 U.S.C. Sec. 7707 (b)) and any other provision of
federal law.

20 AB 2950, Cal. Bus. & Prof. Code § 17529.5(a) (2008) (emphasis added). The
21 California Legislature’s goals, as reflected in its legislative history and AB 2950,
22 dovetail with Congressional intent in passing CAN SPAM. In light of this clear
23 expression of legislative intent, it is beyond question that Plaintiffs’ claims seek to
24 stretch the State Statute far beyond what the legislature intended and far beyond
25 what *Kleffman* holds is permitted.

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27
28 ⁶ AB 2950 has been enrolled by the Legislature. Reunion.com understands that the bill will be
tendered to the Governor for his signature once a state budget has been passed.

1 Plaintiffs allege that Reunion.com violated § 17529.5(a)(1) by including a
2 third-party domain name in the email, relying specifically on the email address of
3 the Reunion.com member whose name appears in the email's "from" line. Section
4 17529.5(a)(1) was intended to address schemes in which defendants
5 misappropriate a third party's domain name surreptitiously, such as when a
6 defendant hacks into an Internet Service Provider's network and uses its email
7 addresses to send emails. Thus, for example, during legislative debate on the State
8 Statute, concerns were expressed that the State Statute could be read to go beyond
9 prohibiting "false domain name[s] or falsification of a header." California SB
10 1457, Assembly Committee, June 22, 2004. In response, the author's office
11 indicated that the State Statute was intended to deal only with "truly falsified,
12 misleading and deceptive spammers, not legitimate business communications with
13 customers." *Id.*

14 The State Statute is not intended to prohibit the inclusion of a domain name
15 from the email address of the person "initiating" the email, here the Reunion.com
16 member. This is confirmed by the Legislature's recent passage of AB 2950 which
17 would also amend what is now § 17529.5(a)(1) -- and what will become
18 § 17529.5(b)(1) -- to read as follows:

19 The e-mail advertisement contains or is accompanied by a third
20 party's domain name **or e-mail address** without the permission
21 of the third party, provided that nothing in this section shall be
22 construed to affect comparative advertising that references
23 domain names **or e-mail addresses**.

24 AB 2950, Cal. Bus. & Pro. Code § 17529.5(b)(1) (2008) (emphasis added).

25 By adding "or e-mail addresses" to the State Statute, the Legislature has
26 made clear that the existing prohibition against using third-party domain names
27 was not intended to cover references to another person's email address; if the
28 existing provision were that broad, there would be no need for the amendment. As
amended, § 17529.5(b)(1) will include two prohibitions: (1) it will prohibit the use

1 of a third party's email address without that party's permission; and (2) it will
2 prohibit the use of a third party's domain name outside the context of an email
3 address without the permission of the owner of the domain name. Reunion.com is
4 not alleged to have violated either prohibition. It used its members' email
5 addresses with their permission, and did not use a domain name outside of the
6 context of the email addresses.

7 Plaintiffs' broad reading of § 17529.5(a)(1) would lead to absurd results; it
8 would make any person liable for forwarding any commercial email because the
9 originating party's email address (including their domain name) would be
10 contained in the body of the email. Since the forwarder presumably will not have
11 obtained approval from the owner of the domain name reflected in the originator's
12 email address, the forwarder would, under Plaintiffs' interpretation, be in violation
13 of the State Statute.⁷ Clearly, that is not what the California Legislature had in
14 mind.

15 Plaintiffs also allege that Reunion.com violated § 17529.5(a)(2) because the
16 emails contained "falsified, misrepresented, or forged header information in the
17 'From' line, which falsely represented that the Email had been sent by an
18 individual rather than Reunion.com." (Complaint, ¶ 48) As noted above, the
19 Reunion.com members identified by Plaintiffs did, in fact, as a matter of law,
20 initiate the emails, and all of the emails identify the Reunion.com member who
21 requested that the invitation be sent. (*Id.*, ¶¶ 24, 27, 31) As such, once again, this
22 contention fails as a matter of law and is fatal to Plaintiffs' claims.

23 All of the header fields in the Reunion.com emails – the "To," "From,"
24 "Sender," "Subject," "Message-ID," "Date" and "Received" fields – are truthful
25 and are not in any way falsified, misrepresented, or forged, as spammers do in
26

27 ⁷ In reality, yahoo.com effectively granted Mr. Dunn the right to use its domain name as part of
28 his email address, and Mr. Dunn has, in turn, granted permission to Reunion.com when he joined
Reunion.com and elected to invite his contacts to join.

1 order to hide their identity. Section 17529.5(a)(2) is designed to prohibit the type
2 of manipulations of email header information engaged in by criminal spammers,
3 not industry-standard forward-to-a-friend invitations sent by legitimate companies.
4 California SB 1457, Assembly Committee, June 22, 2004.


5 Finally, Reunion.com did not violate § 17529.5(a)(3) because the subject
6 line is not misleading. The conclusion Plaintiffs claim they could have been led
7 to – that they were being asked by their friends to join Reunion.com – is precisely
8 what took place. These subject lines simply are purely descriptive as utilized by
9 Reunion.com and virtually every other social networking site and are clearly not
10 likely to mislead, as evidenced by Plaintiffs' failure to allege that they were, in
11 fact, misled.

12 CONCLUSION

13 Plaintiff's Complaint effectively asks this Court to find that the FTC, which
14 spent years analyzing the issue, is absolutely wrong, and to ignore the express
15 terms of CAN SPAM, the FTC's rulings interpreting CAN SPAM, and the
16 California Legislature's clearly-expressed intention to regulate consistent with
17 CAN SPAM. Moreover, to allow Plaintiffs' Complaint to stand, the Court would
18 also have to reject existing precedent holding that these types of claims are
19 preempted by CAN SPAM. There is simply no justification for such an
20 unsupportable outcome. For all the foregoing reasons, Reunion.com prays that the
21 Court dismiss Plaintiffs' claims with prejudice and grants such other relief as the
22 Court deem just and proper.

1 **DATED:** August 25, 2008.

Respectfully submitted,
REUNION.COM, INC.

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By: RONALD JASON PALMIERI
One of Its Attorneys

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

VIOLETTA HOANG, LIVIA HSIAO,
and MICHAEL BLACKSBURG,
individually and on behalf of all others
similarly situated,

Plaintiffs,

vs.

REUNION.COM, INC., a California
corporation,

Defendant.

No. 3:08-cv-3518

**(PROPOSED) ORDER GRANTING
DEFENDANT'S MOTION TO DISMISS
PURSUANT TO RULE 12(B)(6) OF THE
FEDERAL RULES OF CIVIL
PROCEDURE**

Hearing Date: October 3, 2008
Time: 9:00 a.m.
Judge: Hon. Maxine M. Chesney
Courtroom: 7, 19th Floor

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 The Court, the Honorable Maxine Chesney, District Judge for the Northern
3 District of California, presiding, has read and considered Defendant Reunion.com,
4 Inc.'s ("Reunion.com") *Motion To Dismiss Pursuant To Rule 12(B)(6) Of The*
5 *Federal Rules Of Civil Procedure* and the other papers filed by the parties. Based
6 on such consideration, the Court rules as follows:

7 Defendant Reunion.com's *Motion to Dismiss* is GRANTED and Plaintiffs'
8 Complaint is dismissed with prejudice pursuant to Rule 12(b)(6) of the Federal
9 Rules of Civil Procedure. The Court finds that Plaintiffs' claims are barred in that
10 they are preempted by the Controlling the Assault of Non-Solicited Pornography
11 Act of 2003 ("CAN SPAM"), 15 U.S.C. § 7707(b)(1), *et seq.* See, *Kleffman v.*
12 *Vonage Holdings Corp.*, 2007 U.S. Dist. LEXIS 40487, *7-8 (C.D. Cal. May 23,
13 2007). Even if Plaintiffs' claims were not preempted, the Court finds that they
14 would still fail as a matter of law in that the emails at issue do not violate Cal. Bus.
15 & Prof. Code § 17529.5(a). As a result, Plaintiffs' Complaint is dismissed, with
16 prejudice.

17 **ORDER**

18 IT IS SO ORDERED.

19
20
21
22 Dated: _____, 2008

ENTERED:

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24
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26 By: _____
27 Maxine M. Chesney, United
28 States District Court Judge